



Case Western Reserve Law Review

Volume 64 | Issue 2

2013

In Memoriam: Edward A. Mearns, Jr.

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Recommended Citation

Melvyn R. Durchslag, *In Memoriam: Edward A. Mearns, Jr.*, 64 Case W. Res. L. Rev. 304 (2013)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol64/iss2/3>

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Melvyn R. Durchslag[†]

As my mentor, Edward A. (“Ted”) Mearns taught me how to teach constitutional law. (For those of you who are my former students, you can blame Ted, not me.) Actually, I overstate it. He didn’t teach me how to master the art of classroom antics; I could not come close to imitating him in that regard. Nor did he teach me how to do the Socratic method. That was all my doing, or undoing, as the case may be. No, he taught me far more important things.

Ted taught me how to read a constitutional case. You would expect I learned that skill in law school, but I didn’t, not really. But if not in school, I thought I certainly learned this skill over my several years of researching and litigating constitutional cases as a practicing lawyer. But I didn’t, at least not the way Ted read constitutional law cases. First, and maybe most importantly, Ted taught me how and why everything in constitutional law is interconnected, something you never appreciate as a student, a practitioner, or a litigator. As he used to say, you push the balloon in one spot and a bump appears in another place altogether. Students rarely appreciate this. And litigators generally don’t care because their only goal is winning the case at hand.

Ted also taught me how to look for the nuances, the linguistic expressions of the Justices, their phraseology, and the structure of their opinions. These help reveal what was really going on in the case. Because for Ted, constitutional law was not an abstraction. It was not simply, or even primarily, an exploration and study of ideas and often conflicting ideologies. It was about people who cared deeply and passionately about an outcome that impacted someone’s life in a profound way. After all, William Marbury couldn’t have cared less whether it was “emphatically the province and duty of the judicial department to [s]ay what the law is.”¹ Marbury was an angry and disappointed man, and it was that anger and disappointment which led to the case that to this day defines the judicial role in our constitutional scheme. Ted brought that home to me.

In addition, Ted taught me the importance of concurring and dissenting opinions, not for the voyeuristic reasons we all seem fascinated by, but because concurring opinions are often the road map to the next case the Court will hear. And dissenting opinions often become the majority’s view, as Justices Holmes, Brandeis, and, more recently (and to my mind, unfortunately), Thomas can so well attest. It may take decades or only a few years before that occurs, but one who teaches constitutional law must be able to convey not only a sense of our constitutional history but of its future direction as well.

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

As both a constitutional historian and a constitutional prognosticator, Ted was not only good; he was profound.

But more than anything else Ted taught me how to “do” constitutional law. What that means precisely, I’m not sure. Maybe Justice Stewart best described it with his oft quoted quip in *Jacobellis v. Ohio*.² But whatever it means, Ted “did” constitutional law. He lived and breathed the subject. His analogous world was that of constitutional law. It was part and parcel of the way he thought, not only about law but about life as well. To him, constitutional law was an extension of his devout Catholic faith. To Ted, constitutional law was law’s moral compass. It guided and ordered civil society and set the goals and aspirations of human interaction.

Moreover the ambiguity of constitutional law, its famous or infamous incoherence, and its seeming political dimensions never seemed to trouble him much. He told me a story when I first started teaching constitutional law, a story I have carried with me ever since. It is about an astronomer’s conference, kind of like the Association of American Law Schools’ annual meeting of pontificators. There was, as there always is, a main speaker who was at the podium expounding on some new and unique—and somewhat off the wall—astrophysical explanation of the origin of the universe. In the audience, one astronomer turned to his neighbor and said, “Here goes old Fred again. Don’t pay any attention to him. I was in graduate school with Fred, and all he did was sit on the quad lawn at night looking up at the stars, probably smoking a bit of the wacky weed, writing love poems to his girlfriend du jour. He was a flake then, and it appears he hasn’t progressed much since those days.”

The punch line of Ted’s story is that Fred may or may not be the world’s greatest flake. In the final analysis, however, Fred’s theory of the origin of the universe is either right or it is wrong, and whether Fred is a flake or not has nothing to do with that essential proposition. It is the job of the constitutional scholar, Ted said, to seek, for example, whether Justice Scalia or Justice Souter has the better constitutional argument. And in doing so, she must ignore the fact that one Justice’s general view of our constitutional order is more “conservative” or more “liberal” than another’s. Moreover, the truth doesn’t lie in whether the scholar aligns herself more closely with one Justice’s judicial or political philosophy than another’s. The answer must lie in some objective analysis that transcends any particular political or judicial philosophy. Like Fred’s goofy theory of the origin

2. 378 U.S. 184 (1964) (Stewart, J., concurring). The exact wording of the famous, or infamous as the case may be, quote is: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [i.e., obscenity]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it . . .*” *Id.* at 197 (emphasis added).

of the universe, whatever his political philosophy, Justice Scalia is either more correct or less correct than the Justices with whom he disagrees.

I concede that this sounds more than just a bit quaint in today's world, even in today's world of scholarship. But when you think about it, to view constitutional law, or law in any of its dimensions, in any other way can only render one hopeless to do anything but be a constant critic. One can never become an agent of change through rational dialogue without the ability to pick apart a legal argument or conclusion on its own terms without reference to the individual making the argument or propounding the theory. To do that is hard work, far harder than expounding a political or constitutional philosophy and finding some Supreme Court language to support your view. Ted was willing to do that hard work; it was part, indeed the essence, of his makeup. That, in large part, made Ted a star—in the classrooms of Virginia, Northwestern, and Case Western Reserve; as captain of the cross country team at Yale University; and more generally in life itself.

Most of my remarks have chronicled my memories of Ted in our professional interactions. But I don't want to leave anyone with the impression that Ted was all work or that Ted's only importance in my life was as a mentor who shaped my professional development. He certainly was that, but above all he was my friend. And friendship, and what friendship means, is extraordinarily difficult to put into words. So I will just say that I treasured being with him, and I am thankful that Bob Lawry and I were able to dine with him on several occasions in his final days. I don't know what he knew about his prognosis, but he never let on that he either knew or was overly concerned. "Oh the doctors are going to try this or that and everything is going to be fine," Ted would say. He was always upbeat and on the road to recovery.

But maybe his most endearing and enduring quality was his selflessness. It was that which made Ted a true and valued friend and devoted husband. Indeed, Ted literally sacrificed everything, including his own health, to care for the love of his life, Pat, a truly remarkable woman in her own right.

I personally don't believe in an afterlife, either physical or spiritual. But maybe for the first time in my life, I hope, for Ted's sake, that my belief or lack thereof is wrong. For if anyone deserves a special place in heaven, it is my friend and mentor, Ted Mearns.

